Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-753

UNITED STATES, *Petitioner*

*v.*

HERMAN R. TESTAN and
FRANCIS L. ZARRILLI, *Respondents*

## BRIEF FOR RESPONDENTS IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

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On Petition for a Writ of Certiorari to
the United States Court of Claims

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## QUESTION PRESENTED

Has not the Court of Claims the right to enter judgment on the issue of liability and leave, for further determination, the amount of damages, if any, due?

## ARGUMENT

*Certiorari Should Be Denied*

The Court of Claims has always entered judgment on the issue of liability, leaving for further determination the issue of damages, if any.

Petitioner contends that the Court of Claims erred in the order entered in this case and further that respondents have not a claim for money damages. This is incorrect since the respondents' claim is for back pay under 5 U.S.C. §5596(b) and the Court of Claims has ruled upon established precedents that respondents have a right to recover back pay.

What is at issue is respondents' entitlement to classification at grade GS-14 instead of their present grade GS-13. The Court of Claims ruled that the action of the Civil Service Commission was arbitrary and capricious in failing to reclassify respondents' positions at GS-14.

Respondents are trial attorneys in disputes article proceedings before the Armed Services Board of Contract Appeals, representing the Defense Personnel Support Center, which procures clothing and equipment, subsistence supplies, and medical supplies. The position descriptions of respondents' positions are identical with the position descriptions of trial attorneys, GS-14, who appear before the Armed Services Board of Contract Appeals on behalf of the Air Force Logistics Command. The Classification Act, 5 U.S.C. §§5101 and 5301, establishes the principle of equal pay for substantially equal work.

The order entered by the Court of Claims finding respondents entitled to back pay and remanding to the Civil Service Commission for further proceedings is not anything new. In *Allison v. United States*, 451 F.2d 1035, 196 Ct.Cl. 263 (1971), and in *Pettit v. United States*, 488 F.2d 1026, 203 Ct.Cl. 207 (1973), the Court of Claims was similarly concerned with actions for back pay, and in *Allison, supra*, suspended proceedings to allow plaintiffs there to



apply for administrative findings, and in *Pettit, supra*, remanded to the Civil Service Commission pursuant to Pub. L. 92-415, 28 U.S.C. §1491 for further proceedings. The Court of Claims has always entered judgments on the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings: See Court of Claims present Rule 131(c); Rule 47(c) of the 1964 Rules: 165 Ct.Cl. 56 (1964); Rule 38(c) of the 1957 Rules: 140 Ct.Cl. 48 (1957); Rule 38(c) of the 1953 Rules: 126 Ct.Cl. 46 (1953); and Rule 38(c) of the 1951 Rules: 118 Ct.Cl. 40 (1951).

Such action by the Court of Claims has been recognized by this Court: *United States v. Caltex, Inc.*, 344 U.S. 149 (1952); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 162 (1958). In *Greene v. United States*, 376 U.S. 149, 153 (1964), an order had been entered by the Court of Claims suspending proceedings pending pursuit of further administrative remedies relative to a back pay claim.

More recently, under the Wunderlich Act, 41 U.S.C. §§321 and 322, the Court of Claims has entered judgments on the issue of liability and stayed proceedings to permit the parties to obtain an administrative resolution from the Armed Services Board of Contract Appeals of the equitable adjustment to which plaintiff is entitled under the Changes clause: *Southwest Welding & Mfg. Co. v. United States*, 413 F.2d 1167, 188 Ct.Cl. 925 (1969); *Clement Bros. Co. v. United States*, 418 F.2d 1356, 190 Ct.Cl. 51 (1969). There is nothing new in what the Court of Claims has done in this case. It has done what it has always done and which has been approved by this Court.

The Court of Claims here ruled that it had the right to judicially review the claim of a person denied equal pay for equal work in a job classification by virtue of such statutory provisions, and that the Tucker Act jurisdiction of the Court under 28 U.S.C. §1491 is adequate for this purpose. It had so ruled in *Allison v. United States, supra*.

It is clear, therefore, that there is no proper basis for the grant of certiorari in this case and it is respectfully submitted that the Petition for a Writ of Certiorari to the Court of Claims should be denied.

Respectfully submitted,

EDWIN J. McDERMOTT
*Attorney for Respondents*